

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 2098 of 2016

In the matter of:

An application under article 102(2) of the Constitution of the People's Republic of Bangladesh.

AND

In the matter of:

A.H.M. Salim

.....Petitioner

-Versus-

Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Works, Bangladesh Secretariat, Ramna, Dhaka and others,

.....Respondents

Mr. Goutam Kumar Roy, Advocate,

.....For the petitioner

Mr. K.M. Saifuddin with

Mrs. Shahida Akhter, Advocates,

....For Respondent No. 2

Mr. Subrata Chowdhury, with

Mr. Rabin CH. Paul and

Mr. Md. Mominul Islam, Advocates

.....For respondent Nos. 9-12.

Judgment on: 13.04.2022

MD. KHASRUZZAMAN, J.

In an application under article 102(2) of the Constitution, Rule

Nisi was issued in the following term:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why Memo No. রাজউক/উ:নি:৬/১/২সি-৩২১/১৫/২৩৭ হা: dated 15.02.2016 issued by the Authorised Officer-6/1, Noksha Anumodon Shakha, Rajdhani Unnyan Kartipakkha (RAJUK), i.e., the respondent No.3(Annexure-A) shall not be declared to have been passed without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.”

Facts necessary for disposal of the Rule Nisi in short are as follows:

Alampana Tower (hereinafter referred to as “the tower”) has been constructed in the south side of Topkhana Road, Segunbagicha being Holding No. 6/7/A after taking necessary approval from the respondent No. 2 RAJUK for the construction of 15 (fifteen) storied residential-cum-commercial building having 04 (four) apartments in each floor of the said tower. The developer company sold the first floor of the said tower to the petitioner. Thereafter, the petitioner has rented the said first floor to the respondent No. 7 to establish “Agora Supershop” by entering into a tenancy agreement on 27.10.2011 and on the basis of the said tenancy agreement, the respondent No. 7 has started “Segubagicha Agora Super Shop” for using the same as commercial purpose. But the respondent No.3 (Authorized Officer)

issued the impugned notice dated 15.02.2016 upon the writ petitioner and also the respondent No. 7 (Rahimafrooz Super Stores Limited) to remove the unauthorized portion of the 2nd floor of the said tower along with a direction to stop commercial use by establishing 'Agora Super Shop' on the first floor of the said tower (Annexure-A to the writ petition). Challenging this notice vide Annexure-A the writ petitioner has filed the instant writ petition and obtained the above Rule Nisi.

The respondent No. 2 contested the Rule Nisi by filing an affidavit-in-opposition along with three supplementary affidavits-in-opposition denying all the material facts contending *inter alia* that the petitioner has constructed the building beyond the approved plan and as such he was served notice for dismantling of the unauthorised construction. On 12.01.2016 while the respondent No. 3 was dismantling the unauthorised portion of Alampara Tower the petitioner himself gave an undertaking on a non-judicial stamp that he would dismantle the rest portion of the unauthorized construction within two weeks but without doing so he has been continuing his business in the residential building. It is stated that the plan submitted before the Court by the petitioner was not approved by the RAJUK and it was forged plan, accordingly a criminal case was started and Anti Corruption Commission took all the papers of the said building, and Mr. Md. Mobarrak Hossain who signed the alleged

plan of the building was never Authorized Officer at the relevant point of time i.e. on 30.01.2008. It is further stated that the petitioner entered into a contract with the respondent No. 7 for renting the space of the tower which is the affairs in between the petitioner and respondent No. 7. Moreover, permission was given to construct the residential building upto 8th floor and it was never approved or sanctioned for using the same as commercial purpose and the petitioner did not obtain any occupancy Certificate for using the same as commercial purpose, accordingly the Rule Nisi is liable to be discharged.

The supplementary affidavit-in-opposition filed by the respondent No. 2 dated 13.04.2022 stated that the developer company in connivance with some employees of the RAJUK misplaced the original layout plan and replaced the same with a forged layout plan in the file maintained by the RAJUK, accordingly on 05.04.2017 Anti Corruption Commission lodged a case for forgery against the Managing Director of the developer company and some corrupted employees of the Rajuk and after investigation Charge Sheet No. 33 dated 27.11.2019 was submitted against the accused. It is also stated that the original file of the Rajuk in respect of the instant case was seized by the Anti Corruption Commission in connection with the said criminal case, accordingly the Rajuk failed to produce the original documents as per direction given on

03.02.2022 by this Court but produced their Register Book before this Court wherein it was stated that the proposed building was approved to construct the same upto 8th floor as residential purpose.

Respondent Nos. 9, 10 and 12 were also contested the Rule Nisi by filing 2 set of affidavit-in-oppositions. In their affidavit-in-oppositions they have denied the material facts as stated in the writ petition and also stated that the petitioner has been continuing his business at their residential building without approval of the RAJUK and this building was approved for residential purpose and as such the Rule Nisi is liable to be discharged.

Mr. Goutam Kumar Roy, the learned Advocate for the petitioner by referring Annexure-C submits that on 30.01.2008 RAJUK allowed their application for using the space for commercial purpose accordingly, the plan was approved and the same is annexed with the writ petition as Annexure-G, thus the petitioner has been using the same as commercial purpose. He further submits that the petitioner being a bonafide purchaser purchased the commercial flat by a registered deed from the developer as in the original record of the RAJUK there was a approved plan as residential-cum-commercial. Accordingly, he paid commercial rate to the developer. Thereafter, he has been paying the utility bills to different authorities as commercial rate. By referring Annexures-C and G he also submits

that one Md. Mobarrak Hossain, Authorized Officer, on 30.01.2008 gave permission to construct 15th storied building for residential-cum-commercial purpose on the basis of an approval of Building Construction Committee in 21st meeting dated 28.06.2007 and on 03.02.2008, and it was communicated to the Power of Attorney holder Md. Asad. He contends that he purchased the flat and space from the developer company as such he failed to submit the letter for using the alleged flat. Since as per section 14 of the Building Construction Act civil suit is barred. Accordingly, he filed this writ petition which is maintainable, and he admits that without exhausting the appeal forum as provided in law he filed this writ petition and obtained the present Rule Nisi.

By referring to the writ petition along with supplementary affidavits and affidavit-in reply, Mr. Goutam Kumar Roy, the learned Advocate appearing on behalf of the petitioner submits that since the layout plan of the building was approved on 03.02.2008 with commercial space in the first floor, and since the petitioner purchased commercial space of the said building by registered deed dated 30.06.2010, the petitioner did not commit any wrong/illegality in entering into the agreement/ contract dated 27.10.2011 with respondent No. 7 for renting of that commercial space of the first floor of the said building and, as such the respondent No.3 has committed illegality in issuing the impugned notice. He further

submits that before dismantling of the case flat owned by the petitioner, no show cause notice was served upon him and as such, the respondent violated the principle of natural justice. He also submits that said Alampana tower has not been constructed beyond the approved layout plan and rather the same was constructed as per the approved plan. Since the construction of the building is in accordance with the layout plan, serving notice upon the petitioner for dismantling unauthorized construction is without lawful authority. By referring to the undertaking as mentioned in the impugned notice he submits that the undertaking given by the petitioner on 12.01.2016 was not voluntarily rather the same was given under compulsion to protect his property from illegal demolition.

Mr. K.M. Saifuddin Ahmed, the learned Advocate for the respondent No. 2 submits that the alleged building was sanctioned for using as residential purpose and it was never sanctioned for commercial purpose and they never gave any 'No Objection Certificate' for using the land as commercial building. He further submits that the petitioner in connivance with the dishonest employees of the RAJUK manipulated and misplaced some documents of the original file. Accordingly, a first information report was lodged and the relevant file of the building was taken by the Anti Corruption Commission, and as such he partially failed to comply

with the order of this Court passed on 02.03.2022. He also submits that the petitioner gave an undertaking to the Rajuk on 12.01.2016 stating that he would demolish the rest portion of the unauthorized building but without doing so he filed the present writ petition which is not maintainable.

By placing the affidavits-in-opposition, Mr. K.M. Saifuddin Ahmed, the learned Advocate appearing on behalf of the respondent No. 2, RAJUK, submits that the petitioner has constructed beyond the approved plan and as such, he has been served a notice for dismantling of the said unauthorized construction with lawful authority. Moreover, Annexure-1 to the affidavit-in-opposition issued by the Alampana Bangladesh Limited from whom the flat has been purchased to have claimed by the petitioner, is very clear in this respect. By the said letter to the respondent Nos. 8 and 9 i.e. the flat owners' association of the said tower it is stated that no agreement was made with any flat owner to use any residential flat as commercial purpose and there is no scope to use any flat as commercial purpose (Annexure-1 to the affidavit in opposition). He further submits that before serving the impugned notice, several notices were served upon the Managing Director of Alampana Bangladesh Limited in respect of the construction beyond sanctioned plan. By referring to Annexure-3 to the affidavit in opposition he submits that on 12.01.2016 while the respondent No. 3 was

dismantling the unauthorized portion of the flat, the petitioner gave an undertaking on a non-judicial stamp with a clear expression that he would dismantle the rest portion of the unauthorized construction within two weeks but he did not keep his promise given in the undertaking. In spite of the aforesaid fact, the petitioner has filed this writ petition for nothing but to harass the respondents. Rather he is continuing the illegal commercial store in a residential building which is illegal on the face of the record. In respect of so called permission dated 30.01.2008 (Annexure-C to the supplementary affidavit filed by the petitioner), Mr. KM Saifuddin Ahmed, the learned Advocate for the respondent No. 2 also submits that Md. Mobarok Hossain who signed the said permission dated 30.01.2008 was never the authorized officer at the relevant point of time i.e. on 30.01.2008 and as such, the alleged layout plan is not only a fake but also a forged one for which the Durnity Daman Commission lodged a first information report on 05.04.2017 for forgery against the Managing Director of the developer company and some corrupted employees of the respondent RAJUK. Later he submits that it is clear in the minutes of the Board Meeting No. 08/2006 that the authority gave permission to construct residential building, as such the petitioner did not come before this Court with clean hand. Thus there is no illegality by issuing the impugned notice, and hence the Rule Nisi is liable to be discharged.

Mr. Subrata Chowdhury, the learned Advocate appearing on behalf of the respondent Nos. 10 to 12 has adopted the submissions of the respondent No. 2 in addition to he adds that it is stated in the impugned notice dated 15.02.2016 that while conducting raid on 12.01.2016 the petitioner was found using the first floor of the said tower as commercial purpose, and so the front side of the illegal structure was dismantled. As a result the petitioner has given written undertaking that he will dismantle the rest of the unauthorized structure within two weeks. By suppressing this material facts regarding the undertaking, the petitioner has filed the instant writ petition which is not maintainable. Thereafter, he added that the 1st floor of the building was allotted for car parking for the owners of the apartment. But the petitioner let out part of the residential apartment for commercial purpose so they have to park their cars on the road side consequently, the Rule Nisi is liable to be discharged.

Heard the learned Advocates appearing on behalf of their respective parties and perused the writ petition along with supplementary affidavit, affidavits-in-opposition and the papers annexed thereto.

It appears from the Annexure-A that the petitioner gave an under taking on the non-judicial stamp of Tk. 300/- stating that he would demolish the rest portion of the illegal works of 2nd floor of

the building within 2 (two) weeks but without doing so the petitioner re-constructed the demolished part, and the 1st floor of the same building has been using for commercial purpose which is the violation of the Building Construction Act. The respondent No. 2 in his affidavit-in-opposition categorically stated that the proposed plan of the building was approved for constructing a residential building, and it was never sanctioned for commercial purpose. It is stated in the affidavit-in-opposition that the petitioner along with dishonest employees of the Rajuk misplaced the original lay out plan from the record and replaced a forged lay out plan in the record. Accordingly Anti Corruption Commission lodged a first information report against the Managing Director of the developer company and some corrupted employees of the Rajuk. After investigation a charge sheet was submitted under sections 409/420/467/468/471/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947.

It appears from Annexure-4 of the affidavit-in-opposition filed by the respondent No. 2 that a clearance certificate for using the land as residential purpose was given by a General Board Meeting of Rajuk held on 30.11.2006 and on the basis of the Board Meeting Serial No. 8/2006 the Chairman of the Rajuk on 26.12.2006 (Annexure-I) took a decision for using the land as residential purpose, but these statements were not denied by the petitioner.

Moreover, the petitioner has failed to show any document before this Court that the authority has given any clearance certificate for using the said building as commercial purpose. The alleged documents submitted by the petitioner regarding approval of the plan of the building as residential-cum-commercial, the respondent No. 2 in his affidavit-in-opposition categorically denied and stated that those documents are forged and manipulated and original documents were replaced by a forged document by the interested party. Thus the disputed question of facts has been arisen.

The subject matter of this Rule Nisi is whether the impugned notice dated 15.02.2016 vide Annexure-A to the writ petition is lawful or not?

For better and easy understanding, the relevant portion of the impugned notice is quoted as under:

“উপর্যুক্ত বিষয় ও সুত্রস্থ স্বাক্ষরকারের ধারাবাহিকতায় আপনাকে জানানো যাচ্ছে যে, বিগত ১২/০১/২০১৬ইং তারিখে বিষয়ে বর্ণিত ভবনের উত্তর-পূর্ব পার্শ্বও ব্যত্যয়কৃত অংশ অপসারণের জন্য রাজউক কর্তৃক উচ্ছেদ কার্যক্রম পরিচালনা করা হয়। উক্ত দিনে উচ্ছেদ অভিযানকালে অননুমোদিত ৩(তিন) তলা ভবনের সম্মুখস্থ অংশ অপসারণের পর পিছনের অংশ অপসারণকালে ৩০০/- টাকার নন জুডিসিয়াল স্ট্যাম্প আপনি অংগীকার করেন যে, ১৫(পনের) দিনের মধ্যে নিজ উদ্যোগে অবশিষ্ট অংশ অপসারণ করবেন। কিন্তু নির্ধারিত সময় অতিক্রান্ত হলেও উক্ত অবৈধ ০৩(তিন) তলা ভবনের অবশিষ্ট অংশ অপসারণ না করে আপনি মেরামত কাজ করছেন যা আপনার প্রদত্ত অংগীকার নামার বরখেলাপ। তাছাড়া মূল আবাসিক

ভবনের ২য় তলা বিধি বহির্ভূতভাবে আগোরা সুপার শপ হিসেবে বানিজ্যিক ব্যবহারের প্রস্তুতি নিচ্ছেন যা ইমারত নির্মাণ আইনের সুস্পষ্ট লংঘন।

এমতাবস্থায় অবিলম্বে অবৈধ অংশ অপসারণসহ ২য় তলার বানিজ্যিক কার্যক্রমের প্রস্তুতি হতে বিরত থাকার জন্য নির্দেশ প্রদান করা হল। একই সাথে উক্ত ভবনের অনুমোদিত নকশার কপি দাখিল করার জন্য অনুরোধ করা হল। অন্যথায় ইমারত নির্মাণ আইন মোতাবেক আইনানুগ ব্যবস্থা গ্রহণ করা হবে।”

It appears that on 12.01.2016 while the RAJUK has conducted raid for dismantling the front side of the flat in question, the writ petitioner gave an undertaking on a non-judicial stamp valued at TK. 300/- with a clear and unequivocal expressions that he will dismantle and remove the rest portion of the unauthorized structure by his own venture and cost. But the petitioner did not dismantle and remove the same even after the expiry of thirty days. As such, the respondent No.3 has issued the impugned notice on 15.02.2016.

Now, question may arise as to whether, the petitioner can challenge the impugned notice when he has himself given an undertaking with clear terms and expressions that he will dismantle the rest portion of the unauthorized structure of the said flat in question.

In this respect submissions have been advanced on the part of the learned Advocate for the respondents that the petitioner is barred from challenging the notice on the face of the undertaking given by

the petitioner, and that the petitioner did not come before this Court with clean hands as nowhere in the writ petition or in the supplementary affidavit filed at the time of moving the writ petition as motion he has stated regarding said undertaking.

Section 115 of the Evidence Act provides “When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any such or proceeding between himself and such person or his representative, to deny the truth of that thing.”

The doctrine embodied in this section is the rule of evidence formulated and applied in Court of law. The rule of evidence as provided in section 115 is the rule of estoppels by any declaration, act or omission. In clear term the provision of law is that the party will not be allowed to go behind the facts admitted in the writing. In this respect, reliance can be found in the case of **Privatization Commission Vs. Golam Mostafa, 16 MLR(AD)239**. Now, before applying the principle of waiver, estoppels and acquiescence whether the writ petitioner, who has the clear, definite and unambiguous representation, has altered his position violating the promise given in the said undertaking.

The impugned notice is very self explanatory in this respect. It appears that the petitioner took 15 days time with a promise to dismantle and remove the rest of the unauthorized structures. But he did not do so. In spite of that, the petitioner repaired the dismantled portion and attempted to start the same as commercial purpose. From this action it is clear that the writ petitioner has altered his position that he cannot do on the face of the undertaking given by himself at the time of raiding eviction work by Rajuk. As such, we are of the view that the writ petitioner is barred from challenging the notice dated 15.02.2016 on the principle of estoppels, waiver and acquiescence.

In respect of the other submissions of the learned Advocate for the respondents that the writ petitioner has practiced fraud and forgery upon the Court to obtain and gain order in his favour because he did not make any statement about the undertaking which he has given at the time of dismantling the unauthorized structure of the flat in question. Having gone through the writ petition along with the supplementary affidavit filed at the time of obtaining the Rule Nisi, we do not find any such statement or the undertaking with the writ petition. As the remedy given in writ jurisdiction is equitable, the applicant must come with clean hands and his application may be rejected for his improper conduct.

Now, in the course of hearing the petitioner by filing affidavit-in reply to the affidavit in opposition submits that the undertaking, which he has given, has been taken under coercion and compulsion. Question comes as to whether the petitioner did take any step against such undertaking. We do not find that the petitioner took any step against taking such undertaking as alleged by him. So, this submission will not do any work in favour of the petitioner.

In respect of the allegation of violation of principle of natural justice as submitted by the petitioner, we have gone through the materials and found that RAJUK authority already issued several notices on the question of dismantle of the unauthorized structure. Moreover, since there is an undertaking as to removal of the unauthorized structure, and since the petitioner has failed to produce any paper to show that there was an approved plan to use commercial purpose, the respondents did not violate the principle of natural justice.

However, from the papers produced by the respondent No. 2 by way of affidavit-in-opposition, it appears that the RAJUK has allowed to construct residential building not residential-cum-commercial as claimed by the petitioner.

It further appears that the writ petitioner is relying upon Annexure-C to the supplementary affidavit filed by him on the basis

of which the petitioner claims that the building in question is residential-cum-commercial which the respondent No. 2 disown the same alleging that the same is forged and forgery one. But fact remains that Anti Corruption Commission (A.C.C.) has already lodged a first information report on 05.04.2017 on the allegation of forgery against the developer company of the building and some corrupted employees of the respondent No. 2 RAJUK and after completion of investigation, the Anti-Corruption Commission submitted charge sheet on 27.11.2019 under sections 409/420/467/468/471/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 which is pending.

So, under no circumstances, the petitioner can get any remedy in this Rule. Rather the petitioner is barred from challenging the notice on the face of the undertaking dated 12.01.2016 which he has given with clear and unequivocal terms at the time of dismantling the front side of the flat in question. Accordingly, since the writ petition is not maintainable, and since the petitioner did not come with clean hands, we are constrained to hold that the writ petition is not maintainable.

Considering the facts and discussions made above, we can rely on the decision of the Board Meeting of RAJUK that the proposed plan was approved for constructing the building as residential

purpose in the land. Accordingly, we do not find any illegality in the impugned order or any substance of the submissions of the learned Advocate for the petitioner.

Accordingly, the Rule Nisi is discharged without any order as to cost. Interim order granted earlier stands vacated.

MD. IQBAL KABIR, J.

I agree.